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FACT FINDING, WEIGHT OF EVIDENCE & REASONABLE DOUBT IN CIVIL & CRIMINAL TRIALS

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ABSTRACT

"It is known maxim of law that it is better to acquit a guilty person than punish an innocent one". How does law support and help to achieve this maxim is to be examined through civil and criminal trials' procedures and announcement of judgments by the courts. To give a final verdict any trial has to find the facts of the case and then apply Law to the same. But facts may have other circumstances that can drastically change the potential reasons for that fact to take place. To sieve through the facts and reasons Law demands from litigants to present the evidence (documentary or witnesses) to the judge. Objective justice can only be achieved when a court system admits only most relevant and trustworthy evidence. The burden of producing evidence is on party what they allege or deny. But Guilt or innocence needs to be established without any doubt to fully practice the maxim quoted above. This article seeks to examine the burden to bring evidence placed on parties in adversarial and inquisitorial legal systems and concept of "reasonable doubt" in the evidences which can change the course of a trial and hence bring unexpected judgment. The article also seeks to highlight common factors in Islamic Law and common law principles regarding proof and reasonable doubt.

KEYWORDS: Burden of Proof, Adversarial and Inquisitorial System, Doubt, Shubha, Islamic Jurisprudence, Evidence, Criminal & Civil Law

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Original Article

1. INTRODUCTION

In the high-stakes area of court trials and justice systems around the world, dubious facts or ambiguous laws can result in unjustified deprivations of life, liberty, or property.[1] Attorneys in civil cases and prosecutors in criminal cases are charged with the responsibility to collect and then present all possible evidence against an offender or a suspect during the investigation phase and then in trial phase.[2] There is always some degree of certainty required to get a judgment in one's favor but this requirement is more unique to the criminal law. It is not to suggest that courts customarily give decisions in civil matters according to this strict "certainty standard" nor it even be possible to do so. But we cannot deny the reality that individuals may often have the luxury of undoing legal mistakes in civil suits; but a verdict of guilty in criminal cases is sometimes irrevocable.[3] Harsher and stricter

[1]Intisar A. Rabb,2015 "Reasonable Doubt" in Islamic Law, 40 *Yale J. Int'l L.* 41. http://nrs.harvard.edu/urn-3:HUL.InstRepos:17421675.Accessed November 27, 2016.

[2] Boyne, Shawn Marie (2010, October 01). Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases. *Washington and Lee Law Review*, (4), 1287, Retrieved from http://elibrary.bigchalk.com.

[3] Laudan, L. (2003). Is Reasonable Doubt Reasonable? *Legal Theory*, 9(4), 295-331.

punishment is reserved for criminal law, therefore due respect has to be given to the right to a fair hearing for the person against whom charges are brought. The procedure followed in criminal justice system is that the prosecuting authority must prove its case. That is to say, it bears the burden of proof in establishing the facts underlying the allegations[4]. This leads to the inescapable conclusion that not even the sharpest minds in the criminal justice system have been able to hammer out a shared understanding about the level of proof appropriate to convict someone of a crime.[5] It is important for the lawyers and judges to understand and to rightly define the "weight of evidence" which is required to eliminate a "reasonable doubt" in any criminal trial. To minimize the risk of a wrong result in a criminal case means minimizing the risk of either of two possibilities: the conviction of an innocent person, or the acquittal of a guilty one. From the perspective of the rules in question, these two wrong results are equally unacceptable.[6]

In any adversarial system of criminal justice system, before the court should convict or acquit a accused, a prosecutor's main task is to "clarify the facts of the case. The judge listens and records the evidence presented in the main proceeding. Then he must summarize the evidence at the end of the proceeding and explain why he/she believes that a certain charge has been proven or not. He can also state his opinion whether he/she thinks a witness has lied and whether or not truth was groomed for it.Based on this the judge can opine whether a witness is credible or not.[7] In the said case the appellant Mr. MacDonald argued that the trial court was at fault in rejecting tendered expert psychiatric character testimony. The court ruled this out by the obiter:

> *"At the outset, we must recall that the appraisal of the probative and prejudicial value of evidence under Rule 403 is entrusted to the sound discretion of the trial judge; absent extraordinary circumstances."*[8]

In the inquisitorial system of criminal justice e.g. German system prosecutors possess a duty to conduct an objective investigation while trial judge is to ensure that all evidence that is necessary to discover the truth is presented at trial.He can cross examine the witnesses himself to find out the truth.[9]

In all these scenarios, common factor is that the degree of certainty about the accusations being proven. Doubt in a judge's mind depends on an lawyer's success or failure in arousing or allaying misgivings, whether about the heinousness of the crime or about the nature of the evidence[10], or both. [11]. The doctrine of "Proof beyond any reasonable doubt" was introduced At the end of the eighteenth century in Britain and the United States. When it was introduced, the principal argument for making it such a tough standard to satisfy was due to:

- The harsh punishments allocated crimes

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[4] Goldman, L., & Lewis, J. (2008, January 01). The burden of proof. *Occupational Health,* (1), 14, Retrieved from http://elibrary.bigchalk.com

[5] Laudan, L. "is doubt reasonable?" (see supra 3)

[6] Justice, J. W. (1995, Feb 09). What is reasonable doubt? *The Vancouver Sun* Retrieved from http://search.proquest.com/docview/243142797?

[7] United States v. MacDonald 688 F.2d 224, 234 (4th Cir. 1982)

[8] Ibid. Albert v. Bryan, Senior Circuit Judge in McDonald case.

[9]Boyne, Shawn Marie, "Uncertainty and search for truth"(see supra note 2)

[10] Sheila, J. (2006, July 01). Just Evidence: The Limits of Science in the Legal Process. Journal of Law, Medicine & Ethics, (2), 328, Retrieved from http://elibrary.bigchalk.com

[11] S.Halfono,"collecting, testing and convincing: forensic DNA experts in Courts", *social studies of science* ,no 5-6,(1998)801-828

- The virtual irreversibility of convictions

By the 1850s, this principle that "guilt of accused must be established beyond a reasonable doubt" had become widely accepted wherever Anglo-Saxon common-law traditions of law were followed. Later as a part of the penal reforms of the nineteenth century, legislatures and courts accepted the notion that the punishment should fit the crime. The range of crimes that carried potentially capital punishment shrank drastically. in the nineteenth century of a system was introduced allowing for the appeal and reversal of convictions if appellate courts find that serious errors occurred during the trial[12]

We must remember, concept of removing "doubt" was designed to protect a defendant from the rush to judgment that was associated with tribal or vigilante justice[13] Evidence law favors the receipt of all evidence that is relevant.[14] One way of removing doubts is to look at the relevance and quality of the evidence presented in the court. However, not all relevant evidence is admissible. Rather, the law generally directs that relevant evidence should be admitted unless there is some "good reason" to exclude it.[15] Rules excluding relevant evidence on this basis include certain rules governing the admissibility of many forms evidences,[16] e.g. the rule against hearsay.[17] Viewed this way, rules of exclusion based on unreliability are premised on the theory that keeping unreliable evidence from the court helps minimize the risk of a wrong judgments.the primary duty of prosecutors and judges is to find the "facts". In criminal cases, the defendant accused needs the quantum of evidence that produces a reasonable doubt in the jury's mind in order to be acquitted. Legal evidence, in other words, need not be held to scientific standards of robustness.[18]

2. FINDING THE RIGHT DEFINITION FOR THETERM REASONABLE DOUBT

The burden of proof is upon the prosecutor. But the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that directs the understanding, and convinces the reason and judgment, of those who are to act upon it. This is what is general requirement to be "proof beyond reasonable doubt". [19]

Legislators have been trying to make sense of what the doctrine means.[20] The evidence in any case must establish the truth of the facts contested to a reasonable and moral certainty. [21] Some interpret it to be a doubt that is reasonable i.e. for which you could give a reason.

As for the standard of proof, it seems apparent that a legally accurate definition of reasonable doubt, by itself, will adequately define the standard. After a careful consideration of all of the evidence, if there remains a reasonable doubt, the Crown has failed to meet the standard of proof required for a conviction and the presumption of innocence prevails. On the other hand, if no such doubt remains, the standard of proof required of the Crown has been met and the presumption of

[12]Laudan, L., "is doubt reasonable". (see supra 3,5)
[13] Ibid
[14] McCormick on evidence. 4th edition. (1992).
[15] Katherine, G. (1998, January 01). Vindicating the right to trial by jury and the requirement of proof beyond a reasonable doubt: A critique of the.... *Georgetown Law Journal*, (3), 621, Retrieved from http://elibrary.bigchalk.com

[16] Many laws around the world have provisions in their Evidence stautes to exclude all irrelevant evidence. Relevancy is defined as some fact which will link the accused or offender to the act in dispute.
[17] Supra note 16.Hearsay is a statement that may be heard/learnt from a third party and witness himself has not witnessed that fact. Such evidence is not admissible being unreliable. e.g. Depositions of inmates in favor of an accused .
[18]Sheila, J.,"Just evidence", (see supra note 11)
[19] Laudan, L. "Is doubt reasonable", (see supra note 3,5,12)
[20] Ibid
[21] Ibid

innocence is displaced.[22] Endorsed by the Second Circuit: A reasonable doubt is a doubt based on reason and common sense; the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. [23]

Author Dennis[24] gave a another classic definition

"The term 'burden of proof', also known as the "onus of proof", refers to the legal obligation on a party to satisfy the fact finder, to a specified standard of proof, that certain facts are true. The term "standard of proof", also known as the" quantum of proof", refers to the degree of probability to which the facts must proved to be true."

In English case of Bater vs Bater,the trial judge had said that the petitioner, who alleged cruelty by her husband, must prove her case beyond reasonable doubt.In appeal Denning LJ spoke of the levels of proof needed:. He stated: [25]

"The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case.'and also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. In proportion as the offence is grave, so ought the proof be clear"

Lord Hailsham,[26] said:

"A reasonable doubt is nothing more than a doubt for which reasons can be given. The fact that one or two men out of twelve differ from the others does not mean that their doubts are reasonable." [27]

In 'Burnett case' in the state of Nebraska,[28] the bench instructed the jury that:

"a reasonable doubt was a doubt that you could explain to your fellow jurors and for which some reason could be given in light of the evidence adduced in the case."

The appellate court later further explored this obiter and asked: What kind of a reason is meant? Must the reason be a weak or strong one? Who is to judge? To whom is the reason to be given? The juror himself ? And jurors are not required to assign to others reasons in support of their verdict.[29] A civil court has a different standard for proof. It will require a higher 'degree of probability' by one party that the other if considering whether a civil offence is established. It does not adopt high degree as a criminal court, even when it is considering a charge overlapping with a criminal nature

Thomas J's remarked in Re Dellow's Will Trusts case[30] that:

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[22] Justice, J. W., "what is reasonable doubt", (see supra note 6)
[23] Edward J. Devitt , FEDERAL JURY PRACTICE AND INSTRUCTIONS , sec12.10, 354 (4th ed. 1987)
[24] Dennis,I, "The Law of Evidence" 3rd edn, *sweet& Maxwell*.london(2007) 438
[25] Bater v. Bater [1950] 2 All ER 458
[26] Three times Lord Chancellor Of UK in the 1970s and 1980s
[27] Goldman, L., & Lewis, J. "Burden of proof" (see supra note 4)
[28] 86 Neb.11(1910)
[29] Morgan v. Ohio, 48 Ohio St. 371, 376 (1891).
[30] Re Dellows's Will Trusts [1964] 1 WLR at 451. (See also Hornal v Neuberger Products [1957] 1 QB at 247)

"The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it".[31]

3. CIVIL AND CRIMINAL PROCEDURES AND RELIABLE EVIDENCE

There are many the approaches that lawyers and judges adopt when assessing the credibility of evidence. In common law systems of justice (Adversarial) in particular, prosecutors in criminal cases take their duty to present the facts differently. Prosecutors for any trial possess the chance to actively participate in the truth-finding process by directly cross examining the witnesses and requesting that the court obtain additional evidence.[32] The downside of this active role is that is that they may become oblivious to contradictory evidence (that may be favoring the accused) and prosecute a case too aggressively. While in civil law procedure countries (Inquisitorial), the law does not aim to establish a truth-finding process in which the truth is produced from a battle between the adversaries, instead the system requires the prosecutors to fulfill an independent fact-finding role. [33].in such system the prosecution has substantial affirmative obligations and even numerous restrictions, neither of which are imposed on the defendant.

Adversarial criminal justice systems presume that the "truth" will emerge from a positions taken and arguments between opposing parties. The prosecution, if it is savvy, will adduce evidence in the form of testimony or documents or physical evidence for every key part of its theory. The aim of presenting the evidence is to corroborate the prosecution's theory of the crime. For its part, the defense may (but is not obliged to) present an alternative theory of the events associated with the crime. At a minimum, the defense will seek to identify weak points in the prosecution's narrative[34]

In inquisitorial systems, the "truth" is the end result of a process that begins with an "objective". The nature of the challenges facing both criminal justice systems underscores the critical role that prosecutors play in the "truth-finding" process[35]

It is also commonly known that the burden of proof required in criminal cases operates at a standard "beyond all reasonable doubt" and that in civil cases it rests "on a balance of probabilities". Let us remember that in a trial by jury, the jurors are supposed to be "the finders of fact." They are the ones who have to decide whether a crime was committed and whether the defendant committed it. The prosecution will generally lay out a "theory" about the crime, that is, a narrative of supposed events in which the defendant participated[36] the presumption of innocence of the accused required that a guilty verdict could be pronounced only if juries were morally certain or certain beyond a reasonable doubt that the accused had committed the crime with which he or she was charged.[37]

The US approach adopts a broadly similar logic to the English approach (since both have common law background) while determining the standard of proof, which is to "instruct the fact-finder about the degree of confidence our society (i.e. jury) thinks he/she should have in the correctness of factual conclusions for a particular type of

[31] Andrew, H. (2013, October 01). The burden of proof in market abuse cases. Journal of Financial Crime, (4), 365, Retrieved from http://elibrary.bigchalk.com

[32] Boyne, Shawn Marie, "Uncertainty and search for truth" (see supra note 3)
[33] Ibid
[34] Laudan, L .,"Is doubt reasonable", (see supra note 19)
[35] Boyne, Shawn Marie, "Uncertainty and search for truth" (see supra note 2,9)
[36] Andrew, H "The burden of proof in market",2013 .(see supra note 31)
[37] see supra note 34

adjudication.[38] Any evidence lower to the level of balance of probabilities in any civil and anything less than beyond reasonable doubt in a crime is therefore not relevant. But the problem remains that it is not helpful if the burden of proof is left somewhere undefined between the criminal and civil standard. [39] Legal Scholars still insist on stricter standard at least in cases where what is alleged is tantamount to a criminal offence. in certain civil matters, some legal scholars propose for a criminal law standard of proof beyond doubt unclear. e.g. in Heinl v. Jsyke Bank (Gibralter) Ltd[40] Coleman J stated:

> *"when dishonesty is alleged the standard of proof should involve a high level of probability, albeit not as high as the criminal standard"*

Hence in a civil action tried on a "balance of probabilities" we may be moving into the territory of the evidence to be clearer and more convincing than would usually be the case.[41] But in the context of a criminal investigation and criminal trials, where complainant and the accused have inherently different roles, with entirely different powers and rights, equalization or equality of roles is not a sound principle [42] The determination of the level of evidence was discussed by the Texas Supreme Court in a case where the jury convicted to 3 years prison, a person for refusing to register for the military service [43] where it said:

> *"The sufficiency of the evidence, in so far as measuring its weight and preponderance, is a question of fact. The clear and convincing test is but another method of measuring the weight of the credible evidence, and thus also a fact question."*It continued:
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> *"This sounds surprisingly similar to the approach adopted in England by the House of Lords in Re CD as discussed above. This intermediate standard of proof requires "clear and convincing evidence" where the individual issues at stake are particularly important.[44]*

Civil law prosecutors may possess a more open mind toward the evidence than in other types of cases; additionally, they may be more inclined to adopt a less biased stance towards the statements presented at trial. In adversarial system, the prosecutor's opinion is largely fixed even before the trial, and the trial is a play designed to "present" those facts to the jury.[45] Evaluating and weighing the evidence in rape cases can be difficult for prosecutors when the case comes down to the suspect's word versus the victim's word.[46]

The due process requirement of proof beyond a reasonable doubt for a criminal conviction takes a different view. As Justice Harlan put it in his famous concurrence in In re Winship,[47] the beyond a reasonable doubt requirement is:

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[38] Addington vs Texas ,441 US 418(1979)
[39] courts have used terms like "reasonable suspicion, "some credible evidence" and "substantial evidence"
[40] The Times,28 sept. 1999,CA (CIV DIV)P662
[41] Andrew, H "The burden of proof in market",2013 (see supra note 32,37)
[42] United States v. Turkish, 623 F.2d 769, 774-75 (2d Cir. 1980).
[43] United States v. Kerley, 838 F.2d 932, 937-38 (7th Cir. 1988)

[44] Issues of privileged communications e.g. between lawyer-client, doctor-patient, state confidentiality etc.
[45] Elisabetta, Grande, "Dances Of Criminal Justice: Thoughts On Systemic Difference And The Search For Truth ,In Crime, Procedure And Evidence In Comparative And International Context" in "*Essays in Honour of Professor Mirjan Damaska*", Jackson, & Langer (2008) .
[46] Boyne, Shawn Marie, "Uncertainty and search for truth" (see supra note 36)
[47] Re Winship, 397 U.S. 358 (1970**)**

> *"Bottomed on a fundamental value determination of our society that it is far worse to convict an innocent person than to let a guilty [person] go free."*[48]

In some state proceedings in USA, there are two standards by which evidence is reviewed: factual sufficiency and legal sufficiency. The requirement of clear and convincing evidence is merely another method of stating that a cause of action must be supported by "factually sufficient" evidence. This was confirmed in Ellis County State Bank v. Keever[49] where the Bank sought an indictment against Keever for hindering a secured creditor. The court determined that:

> *"The requirement of clear and convincing evidence is merely another method of stating that a cause of action must be supported by factually sufficient evidence."*[50]

Courts still agree that in civil cases court should find for one party rather than the other if the " preponderance of the evidence" favors the former. The word "probability" brings to mind terms such as "chance," "possibility," "likelihood" and "plausibility", none of which appear to suggest the high level of certainty which is required to be convinced of a defendant's guilt "beyond a reasonable doubt". Obiter of J Blackmun and J Souter in Victor case, regarding murder convictions of the two accused stated the following :[51],

> *"a firm belief in guilt," i.e., the juror must be "fully convinced." How, you may ask, can you be fully convinced of a proposition that you believe to have a likelihood of say 95 percent? Indeed, the 5 percent uncertainty implies that the juror is less than fully convinced…"*[52]

Even in the law, at least the civil law, we see the same pattern. The judge in effect simply says "Open your mind to all the evidence and then see if you are fully persuaded (or firmly convinced, etc.) at the end of the trial[53] where charges relate to very serious matters, a sliding or heightened scale is expected to be applied. Take example of for medical cases where the standard is currently the standard applied in criminal cases; that the panel hearing the case is "satisfied so that it is sure" of any finding of fact. These words are taken to mean proof to a high degree of probability, but not proof beyond a shadow of a doubt. so this seems closer to civil standard that a decision can be made on the basis of what is more likely than not. Thus, the panel will need strong evidence to support a finding of fact. In McCallister case [54] it was said that what is of prime importance is that the charge and the conduct of the inquiries should be fair to the medical doctor in question in all respects. In cases before the General Chiropractic Council in 2004[55], the question of the standard of proof arose. The quote from the judgment is that:

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[48] Ibid
[49] Ellis County State Bank *v.* Keever, 870 S.W.2d 63 (Tex. App. 1992)
[50] Ibid
[51] Victor v. Nebraska 511 U.S. 1 (1994)

[52] Ibid
[53] Laudan, L. "Is doubt reasonable", (see supra note 34)
[54] Mcallister V General Medical Council: Pc 3 Feb 1993. It looked at past competence of medical practitioner with his current practice.

[55] Chiropractics is Bone related medicine field. The Professional Conduct Committee of the council considers cases that are referred from the Investigating Committee and relate to chiropractors' conduct, competence or conviction for criminal offence. The Professional Conduct committee meets in public to decide a Whether the facts of the allegations are proved b Whether the proven facts amount to unacceptable professional conduct If unacceptable professional conduct has been proved, evidence in mitigation can be presented by the chiropractor, or his representative, to the Professional Conduct Committee. At this stage the Committee will also be told of any previous findings against the chiropractor. The Committee will then decide in private what sanction to impose on the chiropractor

> *"the more serious an allegation of professional misconduct is, the stronger must be the evidence before that allegation is proved on the balance of probabilities."* [56]

Then how do civil law prosecutors translate their duty to be "objective" in serious-crime cases that go to trial? Do they ask the court to acquit a suspect when they doubt the witness's credibility? We may analyse decision-making during rape trials, we can understand more fully how civil law prosecutors interpret their duty to view the evidence "objectively" and how their function as a "second judge" shapes their decision-making at such trial. Moreover, by examining decision-making in cases in which the credibility of the victim, witnesses, and defendant is extremely contested, there is a unique role for the truth-finding by a prosecutor.[57] Sexual assault and rape cases pose unique challenges to prosecutors as well as to the definition of "objectivity". In such cases, the crime may have occurred in private, and the investigation often focuses on the statements of the victim and the suspect. In these cases the physical evidence is many a time inconclusive and the defendant claims that the victim consented, the focus of the fact-finder or investigator's inquiry is often directed at the victim's credibility. Prosecutors in adversarial system are often reluctant to file charges in rape cases and even less likely to bring those cases to trial unless there is a high certainty that a jury will return a guilty verdict. But in inquisitorial courts rape victims need not struggle to conform their testimony to the strict evidentiary guidelines that bind testimony given in adversarial courts.[58] Witnesses may speak in a narrative form, (which would be considered weak in common law courtrooms). Due to these procedural differences, one finds inquisitorial courtrooms to be more congenial to rape victims and, as a result, victims to be more willing to report the crime and cooperate in the prosecution.

Another problem is that most of the evidence-collection process is dominated by the police, and prosecutor-Lawyer may have prepared the case file and filed charges without ever meeting a single witness. Many Prosecutors differ in their work practices in different crimes and their investigations.

Admission of Scientific or forensic evidence is another area to be looked into. It is considered problematic largely because of the difficulties it poses for the non-scientist judges and jurors who are charged with evaluating it.[59] To contend with this problem, the law imposes special rules designed to ensure that scientific evidence is not admitted unless the evidence is sufficiently reliable. The Supreme Court interpreted the rule in Daubert v. Merrell Dow [60] to impose a requirement of "evidentiary reliability that is trustworthy." In other words, reliability is the main concern for admitting the forensic evidence. No doubt some may show hesitation at the idea of changing rules of evidence so that they no longer apply to criminal defendants. But rulings on the admissibility of evidence are largely discretionary for the courts. [61]

5. ISLAMIC LAW PERSPECTIVE ABOUT RESONABLE DOUBT

There is a significant part of the globe which practices Islamic Law and procedures for convicting the offenders. Islamic criminal law also has three groups of crimes where punishments are to be pronounced as :

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[56] Ibid

[57] Boyne, Shawn Marie, "Uncertainty and search for truth" (see supra note 36,46)

[58] William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems, 32 *Stan. J. Int'l L.* 37, 42-43 (1996)

[59] Bert Black et al., Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge, 72 *Tex. L. REV.* 715, 716-17 (1994).

[60] Daubert V s Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993)

[61] Katherine, G. (1998, January 01). "Vindicating the right to trial by jury". (see supra note 16,18)

- Fixed by the *Holy Qur'an*, no discretion allowed. They are those *Ḥudūd* crimes which are mentioned clearly in the Holy Qur'an e.g. adultery or sexual misconduct.
- *Qiṣāṣ* cases i.e. murder and personal injury cases.
- Discretions where judge can use his personal best judgment to pronounce punishment. E.g. new criminal behaviors which were not mentioned in Islamic Law's primary sources of *Holy Qur'an* and *sunnah.*

Islamic Jurisprudence also has an aspect of "doubt" which can affect the judgment in the trials., Muslim judges and jurists,by using their strong interpretative skills and scholarly authority, have developed a significant role for notion of doubt in court rooms, and in the process, they have actually further defined and updated Islamic criminal law. They packaged their doctrine in the form of a statement calling on judges to "avoid criminal punishments in cases of doubt."[62] This statement can be termed as Islamic law's *doubt canon*: a doctrine that came to be oft-repeated as a broadly recognized legal maxim.[63] The Arabic word for the concept, *shubha*, was a term of art that referred to doubt and ambiguity of all types. the Islamic doctrine coveres *factual doubt*, *legal doubt*, and even *moral doubt* about the propriety of punishment.[64]

6. THE HISTORIC CASE OF MĀʿIZ:[65]

Māʿiz was a enthusiastic new convert, who came to the Prophet Mohammad (peace be upon him) to confess adultory (*zinā*), begging to be punished. But Holy Prophet sent Māʿiz away, declining to hear the case. Māʿiz came back three times, each time confessing and requesting the punishment, but the Holy Prophet (PBUH) still did not pass the judgment and told him to go away. But when Māʿiz came the fourth time, the Prophet (PBUH) finally asked some of Māʿiz's neighbors about the defendant's state of mind. The Prophet (PBUH) then pronounced that Māʿiz had not committed adultery within the full meaning of the term, but perhaps had merely "kissed or looked at with temptation" another woman. But Māʿiz insisted that he was of sound mind and had committed adultery within the full meaning of the term. On this the Prophet (PBUH) pronounced a verdict of guilt, but did not punish him. On this the town took the matter into its own hands and stoned Māʿiz to death. When the Holy Prophet (PBUH) learnt of this fact, he disapproved and was extremely saddened. He said that they "should have let Māʿiz go. If Māʿiz had repented, Allah would surely have accepted his repentance, which would have absolved him of punishment".

From this it appears that the Prophet (PBUH) was reluctant to punish Māʿiz, and he had never intended to enforce the punishment at all. On these grounds, the Prophet (PBUH) who of all people should have been strict to follow God's commands was willing to set aside a strict reading of the text. Muslim jurists devised two interpretive approaches (textual and contextual) to the notion of 'Doubt' from this case. [66]

The first approach i. e. textual, enforces punishment strictly in accordance with the text. The second approach i.e contextual aims to avoid punishment through contextual reading of statutory text, seems to depart from the text and be responsive to extra-textual context. second approach, is "pragmatic textualism," suggests that even Qurʾānic textual rules

[62] Rudolph Peters, Crime And Punishment In Islamic Law (2005)
[63] Intisar A. Rabb, *Islamic Legal Maxims as Substantive Canons of Construction:* Ḥudūd-*Avoidance in Cases of Doubt*, 17 ISLAMIC L. & SOC'Y 63 (2010) .He argues in it for cases of inherent ambiguity which actually raises *shubha* and punishment should be avoided .
[64] Intisar , "Reasonable doubt in Islamic law" .(see footnote 2)
[65]MuḤammad b. Ismaʿil al-bukhārī, saḤiḤ no. 6824 (Muṣṭafā al-Dhahabī ed., Dār al-Ḥadīth 2000)
[66] *AL-BUKHĀRĪ* (See Supra note 65)

were qualified by extra-textual concerns that affected whether both convictions and punishments were warranted in particular cases. and there is an antipathy is in Islamic legal system toward the death penalty on dubious grounds which should have prevented punishment. This approach gave rise to the contextual rule that judges should *avoid* punishments whenever circumstantial considerations convert the propriety of punishment into "doubt."

CONCLUSIONS

Proof beyond a reasonable doubt is a proof that should firmly convince a court of the accused's guilt. Just like other things in this world that we cannot know with absolute certainty, in criminal cases the law should not measure proof that overcomes every possible doubt.[67] This "beyond doubt" standard is defendant-friendly because it requires the prosecutors to establish much more than merely probability of guilt. We should also keep in view that many crimes now carry punishments that are only fines. Some offences can involve nothing more than probation or relatively brief times of imprisonment.[68] "Beyond doubt" standard imposes on courts to acquit and free the defendants only to avoid punishments due to doubts. This can be relevant in the civil-criminal overlapping cases like financial abuse actions, but what about the rest? That being the case it would seem illogical to apply a burden of proof that normally exists only for criminal cases.[69]

It is not out of place to suggest a new interpretation of the "burden of proof" from a third perspective. The English or USA legal systems do not have a 'third standard of proof', but in some instances we see a new approach. Richards LJ remarked in case that the difference of balance of probability or beyond doubt is only philosophical.[70] In the said case the appellant was detained under section 37 of the 1983 Act as a mental patient with a restriction under section 41. He sought his release. The court decided that the standard of proof in such applications remained the "balance of probabilities", but that standard was flexible, and varied according to the seriousness of the allegation. Obiter was :

> *"Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*

In Re D [71] Richards LJ indicated that he regarded the difference as academic. As to the standard of proof he said that in some contexts a court has to look at the facts more critically or "more anxiously" than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying.[72] Is there a significant difference between trying a case on a balance of probabilities but subject it to a higher quality of evidence and trying it under a higher burden of proof? It may need clear guidance on how high that burden should be in any particular case.[73]

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[67] Justice, J. W., "what is reasonable doubt", (see supra note 6,27)
[68] Larry,L. "Is doubt reasonable", (see supra note 53)
[69] Andrew, H ,"The burden of proof in market",2013 .(see supra note 32,37)
[70] An, Regina (On The Application Of) V Mental Health Review Tribunal (Northern Region) And Others: Ca 21 Dec 2005

[71] In Re D; Doherty, Re (Northern Ireland); *Life Sentence Review Commissioners V D: Hl* 11 Jun 2008
a prisoner had asked for release ,in considering his application he complained that the sentence review Commissioners had taken into account allegations not tested in court, had accepted video evidence without requiring the girls to attend, and applied the wrong standard of proof. The Commissioners now appealed a decision that their own decision had been reached unlawfully
[72] Ibid
[73] Andrew, H ,"The burden of proof in market",2013 .(see supra 32,37, 70)

In 2005 the Massachusetts Governor Mitt Romany introduced a bill regarding death penalty [74]. The bill included several provisions that have never been tried in any other state. It requires that there be "conclusive scientific evidence". And that it would allow a death penalty to be imposed only if a sentencing jury finds there is "no doubt" about defendant's guilt, a standard that is stricter than "beyond a reasonable doubt." That standard could be met by combining corroborative evidence from several sources (e.g., DNA, fingerprints, and photographs) to link the defendant definitively to the murder scene.[75] The press release quoted Romney as saying that the bill provided a "gold standard for the death penalty in the modern scientific age." Romney also declared, "Just as science can free the innocent, it can also identify the guilty."

The weakness in the death penalty statutes in other states is the fear that you may execute someone who is innocent[76] You will note that the prosecutors must establish the accused's guilt beyond only "reasonable" doubt, but not "beyond any doubt." So reasonable doubt is exactly what it says i.e. Doubt based on reason and on the logical processes of the mind. It is not a fanciful or speculative doubt, nor is it a doubt which, if you ask yourself "why do I doubt? It is a doubt to which you can assign a logical reason by way of an answer.[77]

There is great many material now available in Islamic legal system too, where the language of the text is now read in the context of the society where it is used. This is closer to common law approach. The four *maḏhabs (shafii, Hanafii, Maliki, Hanbali)* developed by the jurists actually is an effort of seeking contextual truth and justification for the best legal answer among the potential alternatives. Language should be checked with context of societies where it used every day.

From this formula, it is now suggested that we should adopt a new intermediate level,[78] known as "clear and convincing evidence" [79]. In a case in Colorado, the state sought an equitable apportionment of the waters of the Vermejo River, which originates in Colorado and flows into New Mexico based on :the court required the standard as :

- clear, convincing and satisfactory evidence
- clear, cognisant and convincing evidence
- clear, unequivocal, satisfactory and convincing evidence

This translates into how much certainty the justice system ought to demand in determining the facts. This third type of standard can allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision".[80]

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[74] NYT, "Massachusetts Governor Urges Death Penalty". 29 April 2005
Accessed 3/1/17.

[75] Ibid
[76] Sheila, J. , "Just evidence", (see supra note 10,18)
[77] Justice, J. W., "What is Reasonable Doubt?" 1995(see supra note 67)
[78] Addington v. Texas 441 U.S. 418 (1979)

[79] Colorado v. New Mexico 467 U.S. 310 (1984) (for equitable apportionment, Colorado's proof is to be judged by a clear and convincing evidence standard).

[80] Hussein, R. (1990), "The federal sentencing guidelines", *University of Chicago Law Review, Vol. 57.*

In the end, we find support of this new type of burden from Professor McNaughton [81] who made the point that such third type of burden of proof actually is burden of persuasion. It is discharged when a reasonable person applying the relevant "burden of persuasion" could find in favour of the party that bears its burden. As test case, such intermediate level of proof can be applied on offences like fraud and quasi-criminal wrongdoings.

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[81] McNaughton, J. (1955), "Burden of production of evidence: a function of a burden of persuasion", *Harv. L. Rev.*, Vol. 68, p. 1382.

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